NO. 20769

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUSSELL G. COURTNEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS DISCLOSING JURISDICTION

On October 7, 1964, the Federal Grand Jury of the United States District Court for the Southern District of California, Central Division, indicted Russell G. Courtney and Barry R. Kornhaber. The indictment [C.T. 2-7] 1/ read as follows:

Count One [18 U.S.C. §2421]:

On or about May 15, 1964 the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce to Las Vegas, Nevada, from Los Angeles County,

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1/ "C.T." refers to Clerk's Transcript.

California, within the Central Division of the Southern District of California; for prostitution, debauchery, and other immoral purposes.

Count Two [18 U.S.C. §2421]:

On or about May 18, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce from Las Vegas, Nevada, to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Three [18 U.S.C. §2421]:

On or about May 22, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce to Las Vegas, Nevada, from Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Four [18 U.S.C. §2421]:

On or about June 7, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interstate commerce from Las Vegas, Nevada, to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery and other immoral purposes.

Count Five [18 U.S.C. §2421]:

On or about June 12, 1964, the defendant Russell G. Courtney, knowingly transported Loretta Hoskins, a woman, in interestate commerce to Las Vegas, Nevada, from Los Angeles County,

California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.

Count Six [18 U.S.C. §2422]:

On or about June 12, 1964, the defendant Russell G. Courtney, knowingly persuaded, induced, enticed, and coerced Loretta Hoskins, a woman, to go into interstate commerce to Las Vegas, Nevada, from Los Angeles County, California, in the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes and with the intent that said Loretta Hoskins engage in the practice of prostitution, and thereby knowingly caused said Loretta Hoskins to go and to be carried and transported as a passenger upon the line and route of a common carrier in interestate commerce.

Count Seven [18 U.S.C. §1503]:

On or about July 29, 1964, in Los Angeles County, within the Central Division of the Southern District of California, Loretta Hoskins, appeared as a witness before a Federal Grand Jury in connection with an investigation and inquiry being had into possible violations of Title 18, United States Code, Sections 2421 and 2422, commonly known as the Mann Act. On or about July 30, 1964, the same Loretta Hoskins was subpoenaed to appear again before a Federal Grand Jury on September 30, 1964.

On or about August 5, 1964, in Los Angeles County, within the Central Division of the Southern District of California, defendant Russell G. Courtney and Barry R. C. Kornhaber corruptly

influenced, obstructed, and impeded, and endeavored to influence, obstruct and impede the due administration of justice by corruptly endeavoring to influence, intimidate, and impede and influencing, intimidating, and impeding the same Loretta Hoskins, who has been and was to be a witness before a Federal Grand Jury, in connection with testimony that the same Loretta Hoskins has given and to give before a Federal Grand Jury, in violation of 18, United States Code, Section 1503.

Courtney entered pleas of not guilty on all counts, and Kornhaber entered a plea of not guilty to Count Seven. The case was transferred to the Honorable Harry C. Westover, United States District Judge, for further proceedings. A jury trial was heard before Judge Westover on May 25, 1965 [C. T. 19]. The court dismissed Count Five of the indictment because it duplicated Count Six [C. T. 51]. On June 3, 1965, the jury was unable to reach a verdict, and the court declared a mistrial [C. T. 52]. On June 21, 1965, a motion for acquittal was denied and the case was transferred to the Honorable Irving Hill.

A motion for continuance of the jury trial was denied on September 10, 1965 after a hearing before Judge Hill. The second jury trial began on September 15, 1965 [C. T. 94]. On October 1, 1965, Russell Courtney was found guilty by a jury of all six remaining counts of the indictment. Kornhaber was found not guilty of Count Seven [C. T. 105].

On October 22, 1965, Courtney was sentenced to four years for Counts One, Three and Six to be served concurrently and to

four years for Counts Two, Four and Seven, to be served concurrently, but consecutively with Counts One, Three and Six [C. T. 112]. Timely appeal was entered by Courtney on October 26, 1965. Bail on appeal was set at $25,000 and application to proceed in forma pauperis was taken under advisement by the court on October 28, 1965 [C. T. 114]. Courtney's motion for reduction of bail to $10,000 was denied on December 13, 1965 [C. T. 118].

On February 24, 1966, Russell Courtney's motion to appeal in forma pauperis was granted.

The United States Court of Appeals for the Ninth Circuit has jurisdiction to entertain these appeals and to review the judgments of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294 (1).

II

STATUTES INVOLVED

Title 18, United States Code, Section 2421 provides as follows:

> "Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia, or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 2422, provides as follows:

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution

or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1503, provides as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented

her $1,000 a week if she would become a prostitute [R. T. 474].

At first Hoskins did not want to be involved in prostitution, but after later conversations and much persuasion by Courtney, she agreed to have some prostitution dates [R. T. 345]. She had debts and financial problems and wished to move closer to town [R. T. 345-346, 478]. Hoskins agreed to Courtney's insistent proposals in the third week of April [R. T. 346, 475].

After Courtney insisted that Mrs. Hoskins make $500 for him, he took her to see his girl friend, Rene Dubeau, whose real name was Beverly Caputo 3/ [R. T. 347, 349]. At this time, Caputo was living at the Casa de Oro Apartments on El Cerrito in Hollywood [R. T. 347, 335]. Since Caputo was not at the apartment, but on an appointment when they arrived, Courtney used a key to let Hoskins in and told her to wait for Caputo and then left [R. T. 348].

Seven hours later, at 10:00 A. M., Caputo came in [R. T. 348]. Shortly thereafter, a man came to the apartment and was introduced to Hoskins by Caputo. He had an appointment for a prostitution date with Caputo, but after meeting Hoskins he indicated he preferred to utilize her services [R. T. 349]. When Hoskins realized why he was at the apartment, she left the main room of the studio apartment and went into the kitchen and then to the bathroom [R. T. 350). Caputo followed her into the bathroom and tried to persuade her to go back to the main room. Caputo

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3/ Beverly Caputo was married to Russ Courtney between the first and second trial. She is hereafter referred to as Beverly Caputo.

finally pushed her out of the bathroom [R. T. 350]. Hoskins returned to the bathroom where Caputo again attempted to convince her to have the prostitution date [R. T. 350-351]. She told Hoskins to take off her clothing and go out to the man [R. T. 351]. Hoskins finally followed these directions and had a prostitution date for which she was paid $20 [R. T. 351]. This money, plus $5. 00 of her own, was placed in a Band-Aid box which Caputo showed her [R. T. 351-352]. The extra five dollars was placed in the box because the date ordinarily paid $25 and Courtney was expected to pick up the money that evening [R. T. 352].

Courtney came to the apartment later and was told by Caputo about Hoskins' prostitution date [R. T. 353]. Courtney promised the new recruit that she would get more money and have many prostitution dates [R. T. 354].

Caputo and appellant showed Hoskins how to use the "trick books". The "trick books" contained lists of former customers' names and are used to make prostitution dates [R. T. 355-360].

Hoskins had never been a prostitute before she was taken to the El Cerrito Street Apartment with appellant [R. T. 467, 473]. Hoskins worked as a prostitute for Courtney from approximately May 1 to June 13, 1964 [R. T. 469].

At Caputo's El Cerrito Apartment, Hoskins had other prostitution dates which Caputo made for her by calling men whose names were in the trick books [R. T. 360]. Courtney was present when these calls were made and suggested prospective customers to Caputo [R. T. 361]. Appellant took money earned on the

prostitution dates of Hoskins [R. T. 360].

When Courtney became worried about some suspicious sounding phone calls and complaints of noise and pedestrian traffic in the apartment house, they moved to the Hart Apartments. The two women rented the apartment under the names of Helen Cain and Geraldine Brooks on May 6, 1964 [R. T. 363, 314-315]. At this second "trick pad", Hoskins had about 15 to 20 prostitution dates a day [R. T. 367]. The manager of the Hart Apartments observed that there was an unusual amount of traffic on the elevator when they used the apartment and that the traffic decreased when they left [R. T. 327]. Courtney was seen several times around the apartment [R. T. 324-326]. The apartment was partially furnished with Hoskins' furniture.

Shortly after moving into the Hart Apartments, the two women made the first of several trips to Las Vegas [R. T. 368]. They used appellant's white 1963 Thunderbird because they were too late to purchase airplane tickets [R. T. 369].

Courtney told the women to take his car to Las Vegas and check into the New Frontier Hotel. He also instructed them to park away from the hotel and to use a false address when they registered [R. T. 369-370]. Names of individuals to contact in Las Vegas were given to them. Appellant strongly warned them not to go to the Thunderbird or Castaways for any reason, but to concentrate on the Sands and Dunes [R. T. 371]. This trip was charged at Count One of the indictment.

The trip lasted for the weekend, but no acts of prostitution

were committed because the women were unable to contact customers [R. T. 372]. They telephoned appellant who was in Los Angeles and informed him of their lack of success [R. T. 372]. Courtney told the women to return to Hollywood within four hours [R. T. 374].

On their way back from Las Vegas (Count Two of the indictment), Hoskins received a traffic ticket for speeding [R. T. 374-375; 294-295]. They went to the Kraft Avenue residence which Courtney rented under the name, Jason Russell 4/ [R. T. 273]. Hoskins and Caputo were apprehensive because appellant was furious and threatened them. Russell Courtney then beat Hoskins and Caputo [R. T. 375-376]. Beverly Caputo was so severely beaten that she had a seizure and they had to call an ambulance [R. T. 376-377]. After they took Caputo to the hospital, appellant said that he would make Hoskins read a script into a tape recorder so that she would not want to report Courtney to the police [R. T. 377]. Hoskins told appellant that "this was not the life for her" [R. T. 380]. She stayed in prostitution for Courtney because she was frightened of him, particularly in view of the beating he had administered to her and Caputo [R. T. 484].

When Caputo was released from the hospital, Courtney and Hoskins took her back to the Kraft Avenue residence [R. T. 380]. Courtney had Hoskins call some friends of Caputo and ask them for

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4/ When the real estate licensee of the Kraft Avenue residence visited the residence she met Caputo who introduced herself as Mrs. Russell [R. T. 276-277; 281-282].

help because Caputo was ill [R. T. 381]. This led to a prostitution date and more money in Courtney's pocket [R. T. 407].

In May of 1964, Courtney accompanied Hoskins on her second trip to Las Vegas (Count Three), because Hoskins had not made any money on the last trip [R. T. 408]. They left on a Friday night in appellant's Continental [R. T. 407-408].

In Las Vegas, Courtney checked into the Three Coins Motel while Hoskins waited in the car. The appellant registered at the motel on May 23, 1964 under the name of R. Santos. The motel manager verified the fact that Hoskins accompanied Courtney [R. T. 218-220; 409].

Hoskins had prostitution dates on this trip at various hotels in Las Vegas and turned over all the money from the dates to Russell Courtney [R. T. 409]. On one occasion, while at the Three Coins Motel, the appellant hid in the closet while Hoskins had a prostitution date in the motel room [R. T. 410-411]. Mr. Dielman, the motel manager, noticed that one night a third person stayed in the room [R. T. 223]. He also noticed that Mrs. Hoskins went out every evening and received several telephone calls [R. T. 223]. Mr. Dielman called a cab for her practically every evening [R. T. 225].

While in Las Vegas, Mr. Courtney took Mrs. Hoskins to meet a friend of his, Bill Wagoner, who made an appointment for her to see the bell captain at the Desert Inn Hotel who they thought would facilitate her prostitution activities [R. T. 413-414]. But no working arrangement could be reached because the bell captain did

not want to use the switchboard and appellant objected to paying a 40% commission on all prostitution dates [R. T. 414-415]. Finally, when the bell captain complained that he had seen Mrs. Hoskins working the Desert Inn Hotel, Courtney agreed to pay him a 40% commission on every prostitution date that he actually arranged [R. T. 415].

Courtney stayed in Las Vegas until May 27, 1964 when he told the Three Coins Motel manager that he was leaving and that he would take care of the costs of his wife's stay [R. T. 222; 1023].

Before Courtney left Las Vegas, Hoskins gave him $500 and wired more money to him in Los Angeles. Western Union sent a $200 money order to appellant on May 29, 1964 and a $225 order to him on May 31, 1964 [R. T. 252-254]. The money used to purchase the orders was from prostitution and sent to Courtney under the alias of Roxanne Leonard pursuant to Courtney's instructions [R. T. 412].

A few days later, appellant returned to Las Vegas and met Hoskins at the Thunderbird Hotel. That night she gave Courtney the money she had earned from prostitution since she had sent him the money orders [R. T. 416].

Russell Courtney directed Mrs. Hoskins to rent an apartment at the Flamingo Park Apartment on Fredda Street in Las Vegas under the name Roxanne Leonard [R. T. 416]. On June 4, she went to the apartment house and Courtney waited outside in his Continental [R. T. 260]. When Mrs. Conry, the hotel manager, would not accept a deposit check from Hoskins, she went out to

appellant who gave her $100 in cash [R. T. 261-262; 418-419]. The night before, Hoskins had taken the check which she attempted to give to Mrs. Conry from a customer, contrary to appellant's instructions [R. T. 417]. Courtney helped her to move into the apartment [R. T. 419]. Appellant then returned to Los Angeles.

Within a few days Courtney returned to Las Vegas accompanied by Caputo, where he found Hoskins at the Thunderbird Hotel contrary to his instructions. He signaled her to go outside. Outside the hotel, Courtney shouted at her and took $150 from her purse [R. T. 421-422]. Then he had Hoskins drive him and Caputo to the airport [R. T. 422]. Hoskins continued to engage in prostitution in Las Vegas. Hoskins gave the proceeds from her dates to Courtney [R. T. 423-424]. Courtney had given her detailed instructions to be followed when she "hustled" bars in Las Vegas [R. T. 539].

Courtney brought Caputo back to Las Vegas in Hoskins' red LeMans [R. T. 422]. This was apparently soon after the ten-day period when the manager of the Hart Apartments observed that she did not see either Caputo or Hoskins at the apartment, but saw the LeMans parked in the garage [R. T. 326].

In Las Vegas Courtney told Hoskins and Caputo to go to Downtown Las Vegas and attempt to make dates with soldiers on leave, but they could not make prostitution dates with the soldiers as Courtney had anticipated [R. T. 424-425].

After experiencing this lack of success, the trio left Las Vegas and returned to the Kraft Avenue residence in Courtney's

Continental, as charged in Count Four of the indictment [R. T. 425]. Upon their arrival, Hoskins discovered that all of her furniture had been moved from the Hart Apartments to the Kraft Avenue residence. When she inquired of Courtney as to why this had been done, he replied that he owned it all and her also [R. T. 426]. Because the Hart Apartments was no longer available and because Caputo's children from a prior marriage were staying at the Kraft Avenue residence, the trio had to use an apartment belonging to one of Courtney's friends for prostitution dates [R. T. 426-427].

On June 12, 1964, Hoskins and Caputo flew to Las Vegas by Western Air Lines [R. T. 309-311; 427-429]. Courtney gave further instructions to them for the trip and warned them that he wanted them to make "6 bills" in Las Vegas for him [R. T. 430]. He also told them that a boat trip was planned and that a movie (possibly pornographic) would be made on the trip [R. T. 431-432].

In Las Vegas, they went to the Flamingo Apartments where Hoskins and Caputo worked as prostitutes [R. T. 433]. Mrs. Hoskins tried to stay away from the apartment because she had not made the $600 for Courtney and because she did not want to become involved in the planned boat trip or movie [R. T. 434]. When she drove by the apartment, she saw a car which she recognized as being that of one of Courtney's associates. She stayed away because she did not want to see Courtney [R. T. 434]. Finally she went to the police and told them the complete story of her activity in prostitution [R. T. 434]. She told the police that she wanted to stop being a prostitute, but she could not get away from Courtney and

she asked them for help [R. T. 435; 485]. The talk with the police led to Courtney's arrest. Later, on June 15, 1964, after Courtney was released, appellant sent a telegram to Hoskins which asked her for money and for her to call him [R. T. 436-437].

In July of 1964, Mrs. Hoskins was interviewed by the F. B. I. and appeared before the Grand Jury in Los Angeles [R. T. 437-438]. She was subpoenaed to appear before the Grand Jury on September 30, 1964 [R. T. 439].

On July 7, 1964, Officer George Sellinger of the Los Angeles Police Department, acting in an undercover capacity, went to the Kraft Avenue residence [R. T. 540-542]. When he knocked at the door, he was met by Caputo [R. T. 542-543]. After he entered the apartment he gave Caputo $100 in payment for a prostitution date [R. T. 543]. She placed the money in a box in the rear bedroom.

Officer Sellinger then summoned Officer McGuire of the Police Department who searched the house and discovered the trick books [R. T. 550-551]. The trick books were the same books that Hoskins had used when she worked for Russell Courtney [R. T. 355-360].

On August 5, 1964 (Count Seven of the indictment), Hoskins went to the Purple Onion to look for Kornhaber, who was at the time an owner and the manager of the Purple Onion, so that she could get back a typewriter she had loaned to him [R. T. 441, 614].

They arranged a meeting at the Cafe de Paris on Sunset for August 5, but it was closed so they went to the Plush Pup and talked [R. T. 442-443]. Kornhaber told her that Courtney wanted to talk

Grand Jury and talked to the F. B. I. about Courtney's activities, appellant pleaded with her because he was afraid of the consequences [R. T. 453-455]. Then Courtney threatened to notify her family, especially her brother [R. T. 455-456]. She went home, and Kornhaber and Courtney called her there a few minutes after she returned [R. T. 457].

A second meeting between Courtney and Hoskins was arranged by Kornhaber at Antoine's Restaurant, but since Courtney did not appear there, the group went to the Luau Restaurant to meet him. At the Luau the discussion commenced at Sherry's continued [R. T. 459]. When the Luau closed, they went to the MFK Drug Store, and throughout the night, the same promises and threats were repeated [R. T. 461]. Courtney and Kornhaber gave Hoskins a note to read which stated appellant had nothing to do with prostitution and that she had lied to the authorities [R. T. 462]. Hoskins finally gave in to the threats and promises, copied over the note and signed it [R. T. 462-463].

Courtney's defense attempted to show that he was not involved in prostitution by showing how he made his money from the twist contests [R. T. 620-621; 655-656; 718]. Appellant owned two expensive cars and paid $220 a month rent at the Kraft Avenue residence [R. T. 1001]. He stated that his average weekly income in 1964 was $200 - $250 [R. T. 1016]. But he made less than $100 over a three or four-week period when he ran dance contests twice a week at the Purple Onion Cafe [R. T. 1102-1103]. Courtney's dance partner expressed uncertainty as to how much

appellant did make as a dancer [R. T. 718-722].

Appellant claimed that brutality and harassment by the police led to his arrest and prosecution [R. T. 785-786]. The defense attempted to raise the specter of conspiracy and plots by the police and parole office [R. T. 744-748]. Officers and investigators testified that they did not harass appellant or physically attack him [R. T. 1163]. An official with the Department of Correction testified that it was standard procedure for parole agencies and the police to work together in individual parole cases [R. T. 1188-1191].

Courtney claimed he was not involved in the prostitution business, though he admitted that he was very knowledgeable on the subject [R. T. 1005-1006].

The Government established that appellant had convinced Kathleen O'Brien to work with another girl, Laura Naples, in prostitution [R. T. 1120]. O'Brien had prostitution dates and gave the money from them to Courtney [R. T. 1122]. Courtney told O'Brien to call Caputo if she needed prostitution dates [R. T. 1121].

IV

ARGUMENT

A.

GOVERNMENT COUNSEL'S REFERENCE IN ARGUMENT TO THE FAILURE OF THE DEFENSE TO CALL BEVERLY CAPUTO, THE APPELLANT'S WIFE, AS A WITNESS WAS PROPER UNDER THE DECISION OF THIS COURT IN BISNO v. UNITED STATES, 299 F. 2d 711.

Since the time of the Star Chambers, Courts have recognized the marital privilege, but it is recognized as a Common Law privilege, not a constitutionally protected right as appellant attempts to establish. Hawkins v. United States, 358 U.S. 74 (1958). As a common law privilege, the marital privilege is not allowed the same unlimited protection given to constitutional rights such as the right against self-incrimination. Wyatt v. United States, 362 U.S. 525 (1959).

The references to Mrs. Courtney throughout the trial were not part of a scheme to prejudice appellant, as in San Frantella v. United States, 340 F. 2d 560 (5th Cir. 1965). The prosecution merely made a few reasonable comments or references to the relation between Caputo and Courtney which comments were not part of a plan or scheme to abridge the privilege. Namet v. United States, 373 U.S. 179, 189 (1962). The references to Caputo were absolutely necessary because as shown by the Statement of Facts she was a party to the prostitution activities in both Las Vegas and Los Angeles and played a primary role in recruiting Hoskins into

prostitution.

Reasonable comment by the government upon the refusal of the wife to testify does not abridge the privilege. Bisno v. United States, 299 F. 2d 711 (9th Cir. 1962).

> "The decision to testify on behalf of her husband rested solely with his wife. We do not believe that Bisno can rely on a privilege personal to his wife, in order to defeat adverse comment by the government. The failure of Bisno to make any attempt to produce her testimony when he alone had the opportunity to do so was a proper subject of comment." Bisno v. United States, supra, at p. 722.

Every comment upon Courtney and Caputo's relationship comes within the scope of this doctrine. In his opening statements, the prosecutor explained to the jury how Caputo was involved in a common plan to use Hoskins in interstate transportation for prostitution [R. T. 191]. References to Caputo throughout the trial were absolutely necessary in order to show Courtney's activities in interstate prostitution because Caputo was an essential instrument in appellant's operation, from Hoskins' first trick in Caputo's apartment to her work in Las Vegas. But while references were made to Caputo's part in the common plan, the Court sustained objections to questions on the purpose of her marriage to Courtney [R. T. 1153] and instructed the jury to disregard the statements by Kathy Lamonte on the purpose of their marriage [R. T. 1182-1183]. The government also showed its respect of the privilege by with-

drawing questions which attacked the validity of the marriage [R. T. 1152-1154]. Throughout the trial, every possible step was taken by the court to protect appellant's rights, but the court wisely did not allow the privilege to be used to defeat references to the common plan to use Hoskins in interstate prostitution.

In the government's argument to the jury, adverse comment was made to the fact that Beverly Caputo was not called as a witness when she could have explained the purposes of the trips to Las Vegas [R. T. 1309; 1334-1335; 1423-1424]. Caputo could only be produced to testify by the defense and when she was not called as a witness, the prosecutor was privileged to make adverse comments upon this. Bisno v. United States, supra, at 722. The United States Attorney's arguments never went beyond the propriety of reasonable comment.

> "Closing arguments may also focus on the failure of defense witnesses to explain certain incriminating circumstances or the opposing party's failure to call as witnesses persons peculiarly within his control."
> Johnson v. United States, 347 F. 2d 803, 805 (D. C. Cir. 1965). Also see Samish v. United States, 223 F. 2d 358 (9th Cir. 1955).

The Bisno problem has never been reached in other Circuits, but the recent cases have allowed the privilege to be asserted outside the presence of the jury. Tallo v. United States, 344 F. 2d 467 (1st Cir. 1965); San Frantello v. United States, 340 F. 2d 560 (5th Cir. 1965). The privilege was similarly protected by this

Court. All discussion of the privilege was in the Judge's Chambers.

The comments made by the government were of slight effect upon the total course of the trial. They were definitely within the scope of reasonable comment and did not have a prejudicial influence upon the jury.

In conclusion, the comments by the prosecution upon Caputo and Courtney's marriage were proper under the Bisno v. United States case, and do not constitute error.

B

THE EVIDENCE PRODUCED BY THE GOVERNMENT WAS RELEVANT AND MATERIAL TO THE CHARGES IN THE INDICTMENT.

Appellant's brief accuses the government trial counsel of massing a great quantity of irrelevant, inflammatory, and inadmissible evidence against Courtney purely for the purpose of showing him to be a bad man. A detailed examination of the basis presented for this serious charge reveals that it lacks foundation.

1. The Discovery of the Trick Books.

On July 7, 1964 Officer Sellinger of the Los Angeles Police Department, acting in an undercover capacity, visited Beverly Caputo at the 4734 Kraft Avenue residence and paid her $100 which was to be in payment for her services as a prostitute [R. T. 545]. In view of Caputo's actions other officers entered the premises,

arrested her and searched the residence, finding a number of trick books and parts of trick books concealed in various areas of the residence [Government Exhibits 18, 19, 20, and 22; R. T. 548-551]. Defendant's counsel withdrew any objections to the search and seizure of the exhibits [R. T. 399].

Appellant's counsel, however, attacks the evidence offered by the government concerning the circumstances of the seizure.

The trial court ruled that " . . . corroboration, first, of how and from whom these books were obtained is relevant evidence. It seems to me that corroboration of Caputo as a prostitute, if reasonably related in time is relevant evidence. " [R. T. 404].

In the light of the evidence earlier admitted in the government's case the ruling was correct.

a. Courtney had enlisted Caputo's aid in recruiting Hoskins as a prostitute [R. T. 347-351].

b. Courtney and Caputo had shown the trick books in question to Hoskins and explained their contents and purpose to her [R. T. 355-360].

c. Courtney had rented the Kraft residence under an assumed name and lived there with Hoskins and Caputo [R. T. 273; 426-427].

d. Courtney had expressed the desire to Hoskins to use the Kraft address as a "trick pad" and had only temporarily been thwarted in his plans by the fact that Caputo's children were also living at the address [R. T. 426-427].

e. Under Courtney's direction Hoskins and Caputo had

operated together as prostitutes in both the Los Angeles area and Las Vegas [R. T. 360; 367-368; 372; 426-427; 433].

f. The offered act of prostitution by Caputo occurred only a few weeks after the last Mann Act count in the indictment.

The testimony of Officer Sellinger was also relevant in that it showed Caputo putting the $100 in a box on the bureau [R. T. 544], a method previously utilized by Caputo in leaving money for Courtney to pick up. The testimony of the searching officer that the books were concealed in various places in the residence bore out Hoskins' testimony concerning the prior concealment of the same "trick books" [R. T. 355; 551].

Quite clearly then the testimony of both officers concerning the circumstances surrounding the search and seizure of the books was necessary to present this highly relevant information to the jury.

Appellant's counsel, however, particularly attacks the fact that the second officer testified that he arrested Caputo. The court had previously stated to counsel that evidence of an arrest was to be avoided by the prosecution [R. T. 405]. Certainly the mere fact of the arrest did not inject any substantial inflammatory evidence into the proceedings, in that it added nothing to the evidence properly admitted concerning Caputo's offered act of prostitution and the search and seizure of the books, except information necessary to a coherent telling of the facts. If the testimony concerning the arrest had been omitted, the testimony before the jury would have been that Caputo offered to "trick" Officer Sellinger and that

moments later other officers entered the premises and found the books. Most probably anyone hearing such evidence would realize that there had been an arrest. Omitting evidence of the arrest would have only served to have presented the facts in an unclear manner.

In view of the clear relevancy of the evidence concerning the seizure of the trick books, the trial court did not abuse its discretion in ruling on the admissibility of the testimony. The very cases cited in the appellant's brief support this conclusion. As the court stated in United States v. Kahaner, 317 F. 2d 459 (2nd Cir. 1963), cert. den. 374 U.S. 835, reh. den. 375 U.S. 926:

> " . . . the judge's conclusion that the relevance of this evidence outweighed any tendency to undue prejudice . . . was in no manner an abuse of discretion; indeed we think exclusion of the evidence would have been wrong." (at p. 472).

The instant case certainly presents a factual situation totally analogous to Powell v. United States, 347 F. 2d 156 (9th Cir. 1965) and Abdul v. United States, 254 F. 2d 292 (9th Cir. 1958), where evidence was presented of criminal violations totally irrelevant to the charges in the indictment.

2. The Court Did Not Err in Ruling That The Statements of Beverly Caputo to Loretta Hoskins in Furtherance of a Common Scheme and Plan Were Admissible Against the Appellant.

Appellant claims that the trial court erred in allowing into evidence the statements made by Beverly Caputo to Loretta Hoskins at the El Cerrito Apartment on the night Hoskins performed her first act of prostitution.

As Hoskins testified, in the third week of April, she gave in to Courtney's insistent requests that she become a prostitute. Courtney then took her to the El Cerrito Apartment so that she could meet Caputo and be induced into prostitution. Later the same night Caputo introduced Hoskins to her first customer. Hoskins, still reluctant to join the unsavory profession, fled to the bathroom on two occasions where Caputo finally convinced her to bestow her favors on the customer for money; money which was left for Courtney in a band aid box in the bathroom [R. T. 345-352].

The basis for admissibility offered by the government at trial was that Caputo's statements were utterances contemporaneous with an independently admissible non-verbal act. United States v. Annunziato, 293 F. 2d 373 (2nd Cir. 1961); Wilson v. United States, 313 F. 2d 317 (9th Cir. 1963).

Quite obviously Courtney's recruiting of Hoskins was relevant to the Mann Act charges in the indictment that it was pertinent to his motive, intent, and purpose in sending Hoskins on the trips to Las Vegas. His actions in this regard, while evidence

of a local criminal violation were intimately related in a line of conduct which culminated in the interstate violations. In addition, evidence of other criminal acts are admissible to show motive and intent. Drew v. United States, 331 F. 2d 85 (D. C. Cir. 1964).

Since Courtney utilized Caputo to aid him in recruiting Hoskins, her statements to carry out this criminal scheme were properly admitted against him.

> "The notion that the competency of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend on the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority are competent against his principal." United States v. Olweiss, 138 F. 2d 798 at 800 (2nd Cir. 1943), cert. den. 321 U.S. 801.

See also Lutwak v. United States, 344 U.S. 604 (1953); Fuentes v. United States, 283 F. 2d 537 (9th Cir. 1960).

The mere fact that the appellant chose as his confederate a girl whom he later married can in no way be thought to eliminate this basis for admissibility. None of the cases cited in appellant's brief concerning the use of a wife's hearsay statements against her husband involve instances where the wife while acting as a confederate in a common scheme and plan made statements in furtherance of that scheme or plan. Peek v. United States, 321 F. 2d 934 (9th Cir. 1963), Olender v. United States, 210 F. 2d 795 (9th Cir. 1954); Ivey v. United States, 344 F. 2d 770 (5th Cir. 1965). For this

reason, the cited cases are totally inapplicable to the instant case.

3. The Testimony of Kathy O'Brien Was Properly Admitted in Impeachment and Rebuttal of the Defense Offered by the Appellant.

The keystone of the government's case was that the appellant, a pimp, caused Hoskins to become a prostitute, sent her to Las Vegas for prostitution purposes, and received substantial funds from this source of income.

In order to rebut this testimony by the main government witness, the appellant produced a large amount of evidence to show that from the time of his release from prison he had lived the life of a hardworking, law abiding person. Courtney himself testified on direct that his first job on obtaining his freedom was in a law office. He later worked at a Vic Tanny gym. From this gym work he turned to several pasttimes, all connected with dancing which included giving dancing lessons, organizing dance contests for pay, entering dance contests for the cash prizes offered. In addition the defense called numerous other witnesses who testified in regard to Courtney's legitimate money making activities. This defense testimony covered a broad period of time, namely from the time of Courtney's release from prison [R. T. 783-787; 947-948] to a period of time substantially after that covered by the offenses charged in the indictment [R. T. 776-777].

The obvious thrust of this evidence was to show that Courtney

had substantial legitimate earnings, that he was therefore not in need or dependent upon income derived from prostitution, and that, contrary to Hoskins' testimony, he was not in need of money from her prostitution activities, and had never demanded money from her.

Since the defense injected this issue in the trial, the defense opened the issue of Courtney's finances to rebuttal by the government. The door was even more widely opened by the appellant's statement on cross-examination that he never had anyone turning tricks for him anytime, at any place [R. T. 1005-1006].

After the statement by Courtney, the government pursued his relationship with Kathy O'Brien in early 1965. Courtney testified that while he knew her and had done her a favor which put her in debt to him, he had never had her turning tricks for him in his apartment, had never threatened her in order to get this money repaid, and had never arranged prostitution dates for her in conjunction with a Laura Naples or Beverly Caputo [R. T. 1008-1011].

Appellant's brief makes the rather astounding claim that Kathy O'Brien's testimony was essentially identical with that of Courtney concerning their relationship (Appellant's Brief, 65). Examination of her testimony reveals a very different story from that told by the appellant. O'Brien's name appeared in Exhibit 18, one of the trick books shown by Courtney and Caputo to Hoskins and later found at the Kraft Avenue address. O'Brien recognized a number of the names listed in the book as being her customers [R. T. 1134-1135].

When O'Brien faced a local charge for insufficient fund

checks, Courtney obtained the services of an attorney to represent her [R. T. 1132]. He also aided her by allowing her to stay at his apartment on Poinsettia Place [R. T. 1118]. Since Courtney felt that she " . . . owed him a year of her life" [R. T. 1119], he demanded money from her. When he felt that she was not paying him enough money, he demanded more payments from her and used physical force on her towards attaining this end [R. T. 1122]. In order to obtain money demanded by him, she followed his suggestion in turning a trick in conjunction with Laura Naples and also participated in a prostitution date with Beverly Caputo [R. T. 1120-1121].

The only possible interpretation of this testimony is that O'Brien acted as a prostitute under Courtney's demands and pursuant to his direction in order to give him money which he knew had as its source her prostitution activities. It is an obvious fact that one way a pimp can obtain a hold on a girl is by obtaining legal services for her and then forcing her to pay off by engaging in prostitution activities for his benefit. Courtney's connection with Beverly Caputo and Laura Naples and his source of customers enabled O'Brien to make some of the contacts necessary to obtain business. As O'Brien's testimony shows pimping may include far more than personally contacting the customers.

Since Courtney's testimony that he had never had any girls turning tricks for him any place at anytime [R. T. 1005-1006], plus the defense evidence that Courtney was a legitimate dancer not dependent on prostitution proceeds for a livelihood were directly

contradicted by O'Brien's testimony, her testimony was properly admitted for impeachment purposes.

In addition her testimony could have been admitted as similar subsequent acts to show Courtney's intent and purpose in sending Hoskins to Las Vegas. United States v. Blount, 229 F. 2d 669, 671-672 (2nd Cir. 1956); United States v. Prince, 264 F. 2d 850, 851-852 (3rd Cir. 1959).

The trial court, however, gave a limiting instruction to the jury that O'Brien's testimony could be considered for the limiting purpose of impeachment [R. T. 1140-1141]. The fact that the local activities did not contain the element of interstate transportation does not so detract from the basic similarity as to cause the testimony to be inadmissible. Certainly a local charge of sale of heroin would be admissible on federal charge for sale of heroin, despite the fact that the federal charge would contain different elements, either concerning illegal importation or failure to follow the requirements of the federal tax laws.

4. The Government's Counsel's Questioning the Defendant Concerning Whether He Had Reported Income for the Year 1964 Was Proper Cross-Examination, and the Defendant's Response Was Properly Admitted for the Purpose of Impeachment.

As noted above, one of the main thrusts offered by Courtney in his defense was evidence purporting to show him as a hardworking person who had legitimate sources of income who did not and would not live off the earnings of prostitutes [R. T. 783-787; 947-948].

Once the defense adopted this line of defense, the government could not be foreclosed in inquiring into the details of his finances. Needless to say, such a penetrating inquiry into a Mann Act defendant's financial status and history would not be appropriate in every Mann Act prosecution. In the instant case the financial issue was injected into the trial by the defense, the government did not go beyond the proper bounds of cross-examination.

Courtney followed his statements concerning his work history on direct, by stating on cross that he averaged $200 to $250 a week from his legitimate sources of income in 1964 [R. T. 1016]. Government counsel then asked him if he had filed a return for 1964, the year of the Mann Act violations charged in the indictment. If the appellant had been a hardworking dancer (as contended by the defense) earning $10,000 honest dollars in 1964, he would have in all likelihood have filed a return. If, on the other hand, the defendant had been a pimp, living primarily off the illegal earnings of prostitution including Hoskins and Caputo, as showed by the government's evidence, there would be considerably lower probability that he would report his earnings.

The relevance of the question and Courtney's statement that he had not filed a return were clear to the trial court which almost immediately gave the following limiting instruction:

> "Ladies and gentlemen of the jury, let me re-emphasize that this defendant is not on trial for any alleged income tax violation. You are not to consider any such possible violation. This testimony has been

permitted for the single purpose of attempting, if it does, to impeach the witness' testimony concerning his income during the years in question, and for no other purpose. So bear that in mind, please." [R. T. 1017].

Appellant cites and quotes Sang Soon Sur v. United States, 167 F. 2d 431 (9th Cir. 1948) (Brief of Appellant, 71) in support of his contention that the cross-examination concerning the tax return was improper. Appellant states that the cited case is on point in that it " . . . involved an extraneous admission of income tax evasion." In fact the case involved a set of facts and legal questions totally unlike that of the instant appeal. In Sang Soon Sur a defendant being prosecuted for tax evasion was deprived of a fair trial by the action of the prosecutor in reading to the jury a statement made by the defendant to a Revenue Agent concerning his prior conviction for violation of the Federal opium laws. The government agrees that the material offered concerning the opium violation was of such an exceptionally inflammatory nature that reversal was inevitable. The government fails, however, to see its application to the instant case.

5. Hoskins' Testimony Concerning the Boat Trip Was Properly Admitted Into Evidence.

In testifying concerning her June 12, 1964 trip to Las Vegas, Count Five of the indictment, Hoskins narrated a conversation she had with Courtney concerning his plans for her at the point of

destination. He told her that he intended to get her into a house of prostitution. He also informed her that a friend of his was going to make a film on his boat on the lake (apparently Lake Mead) in which she would appear [R. T. 430-431]. Appellant interprets her testimony as stating that the film would be pornographic. Since she only stated that she was informed that the film would be " . . . like that camera and tape recorder the day we came back from Las Vegas on the first trip" [R. T. 432], the meaning of her testimony is rather unclear.

Assuming that the appellant's interpretation is reasonable the evidence was clearly admissible in proving Count Five, which charged Courtney with transporting her to Las Vegas " . . . for prostitution, debauchery, or other immoral purpose". Making a pornographic film would certainly constitute an "immoral purpose". Appellant's argument is, therefore, based on the contention that it was improper to admit evidence of statements by Courtney which outlined his immoral purposes in order to prove his immoral purpose. The invalidity of this argument is apparent on its face.

6. The Government Counsel's Questioning of Defense Witnesses Did Not Exceed the Proper Bounds of Cross-Examination.

Appellant contends that the record of trial reveals a pattern of improper cross-examination and impeachment by government counsel. As one of the allegedly flagrant examples of this conduct, appellant cites the cross-examination of Courtney concerning calls

made to the Kraft residence.

Courtney was asked whether or not he realized Caputo was receiving calls at this residence, rented by him and where he resided with Caputo, concerning prostitution dates. In responding to the question, Courtney volunteered the information that Caputo had received a call from Mr. Hall who had previously testified as a witness for the defense [R. T. 929-939; 984]. After Courtney introduced the subject of the call, government counsel questioned him further concerning the call. Courtney testified that he " . . . didn't actually speak to him. I answered the phone, and he said it was Bobby Hall, and that he wanted to speak to Beverly."

Since Courtney's testimony in this second trial conflicted with this testimony in the first trial, the government read part of the transcript of Courtney's prior testimony to impeach him. In the earlier proceeding Courtney had testified that, "The day of the 7th I got a call from Bobby Hall and he said that he was a friend of Mr. Schwartz." [R. T. 986]. This prior testimony indicating that Courtney had in fact talked to Hall was properly admitted in impeachment of his testimony that he hadn't really talked to Hall.

Although Courtney's prior testimony incidentally intended to show that Hall lied when he denied talking to Courtney at any time shortly before the Luau meeting [R. T. 938], the evidence was still properly admissible in impeachment of Courtney. Appellant's contention that the read testimony did not impeach Courtney and was only directed at Hall is simply not supported by the record.

Appellant also attacks the use of Courtney's prior testimony

to impeach him concerning his reasons for moving from the Paramount Apartment to the Kraft address. In his direct testimony Courtney attempted to explain his reasons for moving from one residence to another, apparently to show that the reasons were completely innocent and totally unconnected with using residences as trick pads.

In outlining his reasons for moving from Paramount Drive to the Kraft residence, he stated:

> "Well, I had numerous reasons. I didn't really like the place, Paramount Drive. It was, I thought fairly expensive for what I was getting. And I saw this ad in the paper about this house on Kraft Avenue and went out and took a look at it. And even though the place was run down, it was a nice place." [R. T. 864].

On cross-examination Courtney repeated the same reasons for moving from Paramount Drive. Since the defense introduced the subject, the government had a right of full cross-examination. Since in the first trial Courtney had given a very different version of his reasons, the government had a right to impeach him with his prior testimony that he had, in fact, moved from the Paramount address because the police searched the apartment [R. T. 998-999]. This is simply another example of the appellant opening the door at trial and expecting to be immune from cross-examination.

Appellant also criticizes the government's cross-examination of Jerry Gutman, Courtney's highly sympathetic parole officer who testified in great detail regarding law enforcement's interest in

Courtney and Courtney's tearful complaints of police harassment. Through Gutman the defense was allowed to tell a story of harassment and persecution, including public humiliation which made it difficult for him to earn a living [R. T. 746-748]. Gutman's testimony also referred to an unproduced note from a parole supervisor which indicated the police interest in the appellant [R. T. 746].

In cross examining Gutman, government counsel asked the witness what the police had told him about their reasons for being interested in Courtney. The clear impression the defense had intended to create through the witness' testimony was that poor Courtney was the object of a cruel vindictive plot by the police. The government counsel's question was directed to showing that this impression was incorrect and that the police were not acting improperly in showing this interest in the parolee.

There can be no question from the record that the government received an answer which it did not expect but which the defense very probably expected and which at least dove tailed into the picture being presented by defense counsel.

After first objecting to the question, trial defense counsel withdrew the objection as follows:

> "MR. STANLEY: I will withdraw the objection. It doesn't matter.
>
> "THE COURT: Pardon?
>
> "MR. STANLEY: I will withdraw the objection.

"THE COURT: You have no objection?

"MR. STANLEY: No, sir.

"THE COURT: Do I understand you have no objection sir.

"MR. STANLEY: No. I have no objection."

[R. T. 753].

Then Gutman gave his answer that a police office had told him "This nigger has no business with white women" [R. T. 753].

Unfortunately one can only guess at the respective expressions of prosecutor and defense counsel at hearing the answer.

The court immediately gave an instruction limiting the jury's consideration of the statement [R. T. 753].

Certainly the record of trial does not show the defense sought to play down "police harassment", as claimed by the appellant (Appellant's Brief 75) but that the claims of persecution were an integral part in of the defense strategy, a strategy furthered by Gutman's blockbuster answer.

Appellant brief makes a great point that although Courtney testified that on one occasion he had been manhandled by the police when his car was run over to the side of the road and dragged from his car, he did not state that he had been hit, struck, or slapped [R. T. 989]. According to this argument government counsel sinned grievously when he asked one of the officers in question whether Courtney had been hit, strucked, or slapped by the officers on the occasion in question. While it would perhaps have been preferable for counsel to have used the same language in questioning the officer

which Courtney used in his testimony, to hold counsel in the heat of trial, counsel who has not had the luxury enjoyed by an appellate counsel of perusing a transcript, to such a standard would be unreasonable. Courtney had indicated that he had been the victim of police brutality. The testimony of the officer was properly admitted to refute such a contention.

C.

GOVERNMENT COUNSEL WAS NOT GUILTY OF MISSTATEMENTS OF THE EVIDENCE TO THE JURY IN HIS CLOSING ARGUMENT.

The allegation by the appellant that government counsel told the jury that the government possessed much evidence which had not been presented is not supported by the record. Defense counsel's argument had tried to emphasize the comparative lack of eye witness testimony other than that of Hoskins concerning Courtney's control and direction of Hoskins' prostitution activities. In essence, government counsel in his final argument pointed out to the jury that individuals involved in prostitution would seldom be eager to incriminate and embarrass themselves by offering such testimony. At no point did government counsel state that the federal investigators had uncovered evidence not before the jury which would have provided additional proof, if presented, that Courtney was guilty [R. T. 1418-1420, 1432].

The cases cited by appellant do not support the contention that such argument is improper. In McMillan v. United States,

363 F. 2d 65 (5th Cir. 1966), a conviction was reversed because highly prejudicial hearsay testimony was presented to the jury and because the prosecutor, in argument, expressed his belief in the guilt of the appellant. Similarly not in point is Corley v. United States, 365 F. 2d 884 (D. C. Cir. 1966) where a prosecutor seriously misstated the alibi testimony which was the heart of the defense case. Johnson v. United States, 347 F. 2d 803 (D. C. Cir. 1965) involved a government counsel claiming that since defense counsel had not utilized the Jencks Act statements of government witnesses made available to him, statements which were not in evidence, the statements corroborated the witnesses' testimony.

Appellant's contention that the government counsel seriously misstated the evidence also does not find support in the record.

The chief example offered by appellant concerns counsel's references to the testimony of Kathy O'Brien and the trick books. Counsel stated that the evidence showed that the trick books which contained her name had been found in Courtney's Kraft residence despite Courtney's denial that the books had ever been at the residence [Counsel's argument - R. T. 1304, 1321, 1427; Courtney's testimony - R. T. 1054]. This statement of facts is in no way a misstatement of the evidence.

Appellant argues that government counsel misstated the evidence when he argued that the evidence established for purposes of impeachment that Courtney had arranged prostitution dates for O'Brien in conjunction with Laura Naples and Caputo. Although O'Brien stated that Courtney had not arranged dates for her, she

stated facts which could be reasonably interpreted as establishing that Courtney had arranged such dates for her. She testified in effect that Courtney had demanded money from her and suggested to her contacting Naples and Caputo for dates in order to earn the money. She stated she had contacted both of the other girls and had thereby obtained prostitution dates [R. T. 1120-1122]. The facts to which she testified showed Courtney arranged dates despite her preliminary answer that he had not arranged the dates. A problem of semantics, eliminated by the elucidating questions has been resurrected by appellant's brief.

Government's counsel's expressed scorn for Courtney's testimony that his financial transactions with O'Brien consisted merely of a generous favor on his part which created a debt owed him [R. T. 1335] was based on the inference properly drawn from her testimony that he had given her the money in order to obtain a hold on her and receive the proceeds of her prostitution activity.

Similarly government counsel did not misrepresent the testimony of Hoskins, Courtney, or Mrs. Courtney concerning the $100 check incident at the Flamingo Park Apartments while Courtney testified that he had casually cashed a check for Hoskins [R. T. 944-945, 1039-1040] and had not pressed her for the money because it was a loan which he thought she was paid back, Hoskins testified that the check was the proceeds of her prostitution activities in Las Vegas (and therefore represented the property of her master)[R. T. 417]. Government counsel only emphasized in argument that there was this major conflict between the testimony

of Courtney and Hoskins in this regard.

Appellant next complains that governmental counsel misrepresented the testimony of Mr. Byrne, the former parole supervisor. His subordinate, Mr. Gutman, testified that the action of the police in contacting the parole officers concerning Courtney was most unusual [R. T. 751]. Mr. Byrne's testimony indicated that it was not an unusual occurrence [R. T. 1190-1191, 1194]. When government counsel stated in argument "Now, we called Mr. Byrne to testify that that just isn't the case; that more often than not, it's not an unusual practice at all . . ." [R. T. 1333], he only inartfully paraphrased Byrne's testimony, he did not misstate the evidence by saying that Byrne testified that such contacts usually occurred in all cases. Gutman's testimony that such contacts were "most unusual" and Byrne's testimony that such contacts were not unusual obviously conflicted -- a conflict which counsel had a duty and right to argue.

Yet another charge of misstatement of the evidence is raised by appellant's contention that there was no basis for counsel's argument that Courtney and Hoskins checked into the Three Coins Motel for the purpose of Hoskins turning tricks at the motel. Since Hoskins testified she did turn a trick of the motel while Courtney hid in the closet, counsel merely argued a reasonable inference supported by the evidence [R. T. 409-410].

The last allegation of misstatement of the evidence concerns government counsel statement that Mrs. Parsons testified that she had seen Courtney at one of the trick pads, the Hart apartments,

" . . . almost every day . . . " [R. T. 1420]. In fact Mrs. Parsons testified on direct that she had seen him at the apartment on numerous occasions [R. T. 324] but on cross retreated to saying she had seen him at the apartment on three or four occasions. Any possibility of prejudice to the appellant was eliminated by defense counsel's prompt objection, the court's direction to the jury that the jury's memory of the evidence should govern, and government counsel's statement that, "If my recollection does differ from yours, of course it is your recollection that governs. I am trying and I hope I haven't misstated anything." Where it is clear as here that no substantial prejudice could result from a misstatement of evidence, such a misstatement is harmless error and does not support a reversal. Cross v. United States, 353 F. 2d 454 (D. C. Cir. 1965).

Trial defense counsel took a more realistic position than defense appellate counsel when he stated in argument that:

> "The attorney in the courtroom -- and it is our job to remember the evidence -- we don't even recall the evidence correctly every time. We can't remember exactly what was said yesterday. And it's changed and that happens in practically every trial." [R. T. 1409].

Since the court carefully instructed the jury that they as the sole judges of the fact had a duty to scrutinize the testimony and that statements and arguments of counsel were not evidence [R. T. 1433, 1436, 1441] and since appellant has now shown any

substantial misstatements of evidence by government counsel, appellant's alleged error is without merit.

Coupled with the allegations of misstatements of evidence, appellant claims that counsel exceeded the bounds of argument by trying to argue the defendant should be convicted because of his "status" as a defendant, rather than on the basis of the evidence.

In support of this charge appellant notes that on several occasions counsel emphasized that the jury should consider Courtney's prior felony conviction for pimping in determining what weight they should give to his testimony [R. T. 1322, 1337, 1416]. The trial court gave the proper instruction to the jury, informing them as to the limited purpose for which they should consider the conviction [R. T. 1435-1436]. Since felony convictions can be used for impeachment purposes, counsel's conduct cannot possibly be considered as error. Michelsen v. United States, 335 U. S. 469 (1948).

Government counsel's argument [R. T. 1424-1425] that the jury could legitimately consider in determining Courtney's guilt or innocence the facts showed by the evidence that Courtney bore many of the earmarks of a pimp, namely that he admitted to detailed knowledge of prostitution, living with prostitutes, and taking money from prostitutes was proper argument based on inferences reasonably drawn from the evidence. Appellant apparently feels that a prosecutor should not be allowed to forecefully argue such inferences but should be limited to a dry recounting of testimony. Such a contention is not supported by any appellate

authority.

Appellant denounces government counsel's description in argument [R. T. 1317, 1325, 1327, 1328, 1332] of the social circle and places setting of events involved in the case as constituting a jungle. The evidence in the case presented by both prosecution and defense revealed a way of life and standards of conduct by almost all the parties involved which, hopefully have not been adopted by the mass of the American public. The term "jungle" is in constant use in this country to describe various problems and institutions. Examples may be found in Upton Sinclair's "The Jungle" (meat packing), "The Green Felt Jungle" (gambling), "The Asphalt Jungle" (crime), "The Blackboard Jungle" (the schools). This once colorful term of description is so overused in our society that it has lost any substantial impact it ever possessed. In this case the evidence merely showed another American jungle, the Sunset Strip-Las Vegas jungle.

Trial defense counsel apparently agreed that the evidence revealed a way of life more appropriate for the jungle. He realized that the members of the jury had possibly been shocked, even by Courtney's own testimony of his style of living. He, therefore, emphasized in his argument that there was such a "jungle" but stressed forcefully that not every male in it is a pimp. The term "jungle" appears in the defense argument far more often than in that of government counsel; it shows up at least seventeen times [R. T. 1343, 1341, 1350, 1351, 1357, 1358, 1361, 1369].

The use of would be colorful terms such as "jungle" is not

rare in final argument. In McClanahan v. United States, 230 F. 2d 919, 926 (5th Cir. 1956) a prosecution for an V. A. housing fraud, the government counsel referred to the defendant as a profiteer and to the veterans utilized by him in the fraud scheme as the " . . . tentacles of an octopus". The court found that these words, in the context in which they were used did not go beyond proper comment and no harm resulted. This Court found that calling a defendant in an assault case a hired gun fighter and hired ruffian did not go beyond the proper limits of argument. Johnston v. United States, 154 Fed. 445 (9th Cir. 1907).

D.

THE JURY WAS PROPERLY INSTRUCTED TO CONSIDER KORNHABER'S STATEMENT ONLY AGAINST THE DECLARANT.

Statements made by a co-defendant are admissible against the declarant to prove the declarant's participation if proper instructions are given to the jury that they are only admissible against the declarant. Delli Paoli v. United States, 352 U. S. 232, 238 (1956); Lutwak v. United States, 344 U. S. 604, 619 (1952); Wong Sun v. United States, 371 U. S. 471, 490 (1962).

Kornhaber's statements to the F. B. I. were admitted as his declarations to prove his participation in the attempt to convince Hoskins not to testify.

Instructions were given to the jury to separate the declarations made by Kornhaber and to only consider them against

Kornhaber [R. T. 1446-1447]. They were the "proper cautionary instructions" as required by Federal case law. Haggard v. United States, 369 F.2d 968 (8th Cir. 1966). Possible prejudice may be overcome by clear instructions. Delli Paoli v. United States, 352 U.S. 232, 1 L. Ed. 2d 278 (1956). Though the instructions were given at the end of the trial, and not at the moment of admission, their clarity and directness were sufficient to correct any possible prejudice to Courtney. A simple instruction is sufficient under normal circumstances unless further instruction is requested by counsel. Parente v. United States, 249 F.2d 752 (9th Cir. 1959).

When the declarations of Kornhaber were admitted, the appellant's counsel made no objection and requested no immediate instructions on the declarations [R. T. 572]. The appellant waived any objection to this admission and to any right to immediate instruction. Rossetti v. United States, 315 F.2d 86 (9th Cir. 1963); Reiss v. United States, 324 F.2d 680 (1st Cir. 1963).

> "It has been held that where as here, no objection is entered or instructions, cautionary or otherwise, are requested, any post-trial objection to the admissibility of the testimony is waived." United States v. Knox Coal Co., 347 F.2d 33 at 44 (3rd Cir. 1965).

No prejudice to the jury occurred by the instruction being given at the end of the trial. Calhoun v. United States, 368 F.2d 59 (9th Cir. 1966). If the judgment was not swayed by the lateness then no rights of the accused were affected by this procedure.

Kotteakos v. United States, 328 U.S. 750, 765, 90 L.Ed. 1557, 1567 (1945).

Furthermore, the lateness of the instruction could not be thought to even possibly effect any count for which Courtney was convicted other than the obstruction count since Kornhaber's statements only pertained to his alleged participation in the violation charged in that one count. Farris v. United States, 24 F.2d 639, 640 (9th Cir. 1928); Sachen v. United States, 343 U.S. 1 (1953).

The imprisonment for the obstruction charge is to be served concurrently with two of the Mann Act counts [R.T. 1511]. Thus any possible prejudice or error did not result in a longer term for Courtney.

E.

HOSKINS' TESTIMONY WAS NOT "INHERENTLY INCREDIBLE".

In determining whether Hoskins' testimony was inherently incredible, as claimed by appellant, and therefore inadequate to support the jury's verdict, this Court should give full consideration to the entire testimony of the witness. Herter v. United States, 27 F.2d 521 (9th Cir. 1928). The total picture of Hoskins' prostitution activities as recounted by her reveals nothing which would appear " . . . highly questionable in the light of common experience and knowledge . . .". Jackson v. United States, 353 F.2d 862, 867 (D.C. Cir. 1965).

Appellant asserts that Hoskins' description of her first act of prostitution, coupled with testimony that she was soon thereafter seeing many customers a day, is unworthy of belief. Certainly after her first few dates her inhibition and reservations would tend to disappear. If Courtney supplied the customers, there is no logical reason why she could not serve them.

Nor is there anything unusual about Hoskins' testimony that on her first trip to Las Vegas with Caputo she was unsuccessful in finding clients while on her second trip she performed many "tricks". While on the first Las Vegas visit she was accompanied only by Caputo, on the second trip Courtney escorted her to insure that she would do some money-producing business [R. T. 368, 408]. Courtney's assistance and the beating he gave her and Caputo after the first financially disastrous trip would logically have substantial effect on her productivity. While appellant claims that Hoskins was no instructed on the second visit, the witness herself testified that she always worked under Courtney's directions [R. T. 539].

The fact that Hoskins could only specifically recall giving Courtney three instances when she gave Courtney money from her prostitution activities [totalling $1075; R. T. 411-413, 422], is not startling in consideration of the amount of time which had passed between the trip and her testimony.

Hoskins' testimony which laid bare her own criminal activities in detail was obviously believed by the jury that saw and heard her testify. Since her testimony was by no manner or means incredible, it is sufficient to support the verdict. United States v.

Terry, 362 F.2d 914 (6th Cir. 1966).

Appellant further contends that it is beyond belief that Hoskins informed Courtney and Kornhaber that she had testified before the Grand Jury and been questioned by agents of the Federal Bureau of Investigation as she testified [R. T. 446, 453-455]. On the contrary since she was trying to impress Courtney with the fact that she had committed herself too far to be able to turn around, recant her story, and lie about her prostitution activities, it is quite logical she would inform him about the federal investigation.

The few examples offered by appellant drawn from the witness' lengthy testimony serve adequately the lack of substance in his argument.

F

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR A CONTINUANCE.

On September 10, 1965, the Court heard appellant's motion for a continuance of a jury trial because of Courtney's injury. Three doctors testified.

Dr. Edwin Plimpton, an orthopedic surgeon, had examined Courtney at the Government's request [R. T. A-44]. Dr. Plimpton could find no condition which would prevent Courtney's appearance if sedation to control his discomfort were given [R. T. A-46]. The examination revealed no distress in movement or restriction of

Courtney's physical activity [R. T. A-47]. Test of movement could reveal only a general soreness in the lower back, and Dr. Plimpton admitted this was a subjective determination because it depended solely on appellant's claim of tenderness [R. T. A-49 - A-50]. Courtney was found to be alert and cooperative [R. T. A-45].

The next witness was Dr. Charles Hutter, an orthopedic surgeon. He was an associate of Dr. Gentile, Courtney's doctor, and testified from Dr. Gentile's records [R. T. A-59]. After reading the record of Courtney's condition, Dr. Hutter declared he was aware of nothing that would lead him to believe that appellant could not stand trial [R. T. A-66]. His condition was not an urgent matter [R. T. A-68]. Pain medication would make appellant able to do routine business activities and to get around until his surgery [R. T. A-66 - A-67]. This medication would not cloud the average person's mind or understanding or force Courtney to stop business or mental activities [R. T. A-67, 69, 70].

The last to testify was Dr. William Bryan, Jr., a surgeon and specialist in hypnosis (despite not having completed a residency in psychiatry) [R. T. 77-79], who was familiar with the drugs that Courtney took to eleviate the distress. Dr. Bryan stated that the medication would have some effect on the mental processes because it was oral, but that the effect would vary according to the particular individual's reaction and depend on his body weight [R. T. A-74]. Though he had never examined appellant, Dr. Bryan believed the medication would cause some impairment of Courtney's judgment [R. T. A-76 - A-77].

The Court denied the appellant's motion because the evidence presented was not sufficient to convince the judge that any prejudice to Courtney would occur if he stood trial the next week [R. T. A-88].

Courtney could not show facts which supported his claim of being under the influence of medication at that time to justify a continuance and the court had sufficient information from the psysicians' testimony to support the denial of the continuance. France v. United States, 358 F. 2d 946, 948 (10th Cir. 1966). Mere discomfort or incapacity is not sufficient grounds for granting the continuance. "There must exist at the time of trial a lack of understanding which prevents defendant from appreciating the nature of the proceeding and renders him unable to aid in his own defense." Smith v. United States, 267 F. 2d 210, 211 (9th Cir. 1959).

The court determined that Courtney had sufficient ability to consult with his attorney with a reasonable degree of rational understanding, and he had a national as well as factual understanding of the proceeding. United States v. Dusky, 362 U. S. 402 (1959); Pate v. Robinson, 383 U. S. 375, 15 L. Ed. 2d 815 (1965).

The pain from the claimed injury and the effect of the pain medication were carefully examined by the Court at this time and throughout the trial so that appellant was not deprived of a fair trial. Hanford v. United States, 365 U. S. 920 (D. C. 1966).

In Judge Hill's chambers, the morning before the trial, the court again heard the appellant's claim of inability to stand trial. After an extensive discussion of the problem, Dr. Sidney

Cohen was asked to examine Courtney [R. T. 13].

Dr. Cohen determined that while it was very likely that Courtney was in pain, he could still understand the procedures of the trial [R. T. 23]. Courtney was sufficiently oriented and unimpaired in his mental ability to both understand the nature of the proceeding and cooperate with his counsel in his own defense [R. T. 26].

> He knows exactly who he is, where he is, what the purpose of his being here is and so forth. His memory and recall are excellent. He remembers both ancient matters concerning himself, and recent; and can give fairly good dates concerning these items. [R. T. 21].

Appellant was only in moderate pain, and if greater pain developed, a recess could be called and medication given to relieve the distress without causing impairment to Courtney's ability to function mentally [R. T. 29].

It should be noted that no recess was ever requested by Courtney.

The drugs used by Courtney at their present dosage would not impair his ability to concentrate over a period of time, but an overdose could make him unable to concentrate or cooperate [R. T. 29].

Courtney had previously told the court that morning that he was taking the medication more frequently than instructed by Dr. Gentile [R. T. 9].

The court after discussion of the question with both counsel decided to revoke bail and place Courtney into hospital custody. This action was a necessary exercise of the court's discretionary power because further injury to appellant or a voluntary overdose of medication could have made a fair trial impossible. Though the court took serious action, such action was necessary under the circumstances of this case.

The court may revoke a defendant's bail during a trial if it is necessary under the circumstance for the orderly process of the trial and does not constitute an arbitrary or capricious action. Fernandez v. United States, 5 L. Ed. 2d 683, 686, 687 (1961).

Once the trial has begun, the public interest becomes more pressing and conduct in or out of the court room which causes a danger to the trial may create power to remand defendant to custody during the trial. United States v. Bentvena, 288 F. 2d 442 (2nd Cir. 1961). It is a question of sound discretion by the trial court. The trial court used its discretionary power reasonably under the extreme circumstance based on the justifiable fear that Courtney might cause self-induced incapacity by taking an overdose. Carbo v. United States, 7 L. Ed. 2d 769 (1962). See also Pouncey v. United States, 349 F. 2d 699 (D.C. Cir. 1965).

Because the appellant could not be admitted to the County General Hospital, he was taken to the hospital section of the Central County Jail [R. T. 89]. He could not be given his usual medication the first night because of usual jail procedure. Non-narcotic substitutes were given to the appellant but this was only on the

first day of trial when the jury was impaneled, counsel made their introductory statements and the first witness testified [R. T. 93].

The court immediately established procedure with the County Jail so that Courtney could receive any medication his doctor wished him to have [R. T. 100]. The following day, the second day of trial, the appellant was placed in St. Vincent's Hospital with adequate official protection [R. T. 241].

The court used every means possible to insure Courtney reasonable comfort while protecting the regularity of the trial. For example, the court informed Courtney that he could use a bed or wheelchair during the trial if he wished and that a recess would be called if he needed it for his health [R. T. 7]. Courtney did not use either of these offers nor did he express a need for them during the trial.

The only question of Courtney's health during the trial was raised by his counsel concerning Courtney's supposedly faltering voice [R. T. 791-792]. Since neither Courtney [R. T. 791] nor the court [R. T. 793] could detect any defect in his voice and since Courtney's only complaint was that he was nervous [R. T. 791] (a hardly remarkable statement for a defendant in trial on serious charges), the court properly refused a defense request that the jury take into account the fact that Courtney was taking drugs in considering his demeanor on the stand [R. T. 793, 798]. Such an instruction would not have been supported by the evidence before the jury.

Certainly the most critical evidence to consider in

determining whether or not the record shows the appellant might have been prejudiced by any of the various ruling of the trial court concerning this health issue is the appellant's own testimony. An examination of this testimony establishes that the appellant was a most able witness in his own behalf. He underwent lengthy direct examination, stood up well to forceful cross examination, and at no time showed any lack of understanding of the situation or lack of memory of any essential facts.

Even if, therefore, it could be concluded that the court violated its discretion in revoking bail, this action did not interfere with the basic fairness of the trial or cause any prejudice to appellant.

This case is not a direct appeal from revocation of bail as in Carbo v. United States, supra and Fernandez v. United States, supra. The trial was completed and any harmless error which may have been made, should be viewed in the context of the total trial and its effect on the jury.

G.

THE TRIAL COURT DID NOT DISPLAY BIAS AGAINST THE APPELLANT.

None of the examples of alleged bias by the court which appellant's brief mentions, revealed bias or prejudice by the trial judge against the appellant. When carefully analyzed within the context of the total trial, the record reveals that the appellant was

tried before a patient and fair court.

1. Appellant attacks the trial court for its concern over the possibility of Courtney taking an overdose of the drugs prescribed for his pain. Since Courtney himself admitted in chambers that he had taken more medication than prescribed by his doctor, the bad effects of which were mentioned by his own counsel [R. T. 5] and since Dr. Cohen stated that an overdose would make Courtney unable to concentrate and cooperate during the trial [R. T. 29], the concern of the court was fully justified.

2. In his brief, appellant gives a less than complete picture of the circumstances surrounding the unavailability of witness Stevenson who had testified in the first trial. When defense counsel raised the question of unavailability, the court granted time to government counsel to investigate the condition of Miss Stevenson. Defense counsel had no objection to this because her testimony could come as well at the end of the trial [R. T. 1044-1045]. When defense counsel later asked if he could put on the prior testimony of Miss Stevenson, the court asked if there were any objections. Government counsel mentioned there should be a showing of unavailability as to her testimony [R. T. 1071-1072]. When the court questioned counsel for the defense, he was unable to give the court definite information as to the condition of Miss Stevenson. Therefore, the court was forced to ask government counsel to verify the matter [R. T. 1072]. When he could not, the court called a recess and settled the problem outside the presence of the jury [R. T. 1073-1074]. Despite government counsel's

objection to the reading into the record of her testimony from the first trial, the court granted Mr. Stanley's request [R. T. 1074]. These events do not show bias by the court, but on the contrary show the court weighing both sides' positions and deciding for the appellant.

3. Government counsel asked Courtney whether he would not be more successful in his professional dancing activities if he used only one name. Courtney replied that a well-known actor, Kookie Byrnes, changed his name four times in two months. The court asked appellant to just answer the questions because they had been into many irrelevant issues. When Courtney balked at this; the court again explained its procedure on questioning to Courtney [R. T. 1015]. This was merely an attempt to control the order and progress of the trial, not an example of bias and prejudice. The procedure to be followed for cross examination is within the discretion of the trial court. Storm v. United States, 94 U. S. 76, 85, 24 L. Ed. 42 (1876).

4. Appellant alleges that the court improperly denied defense counsel a continuance to obtain the presence of the manager of the Poinsettia Apartment, who, it was represented, would rebut Kathy O'Brien's testimony concerning "living with" Courtney. It is also claimed that defense counsel made a showing of due diligence in attempting to serve this witness.

The record reveals a very different picture from that represented by appellant's brief. The day after O'Brien's testimony, trial defense counsel first informed the court he had subpoenaed the

witness, then stated he was trying to subpoena the witness but that no one was available to serve the subpoena. He expressed doubt as to whether or not he would be successful in obtaining service [R. T. 1216-1217].

The court interpreted this rambling statement by counsel as being a request for a continuance and stated in effect that the view of this lack of showing of diligence, the defense would be deemed to have rested if it ran out of witnesses [R. T. 1217].

At that point the court rested for lunch [R. T. 1217].

Immediately after lunch the court denied a government's request to reopen to present further material rebutting Gutman's (the parole officer) testimony since the government had not shown due diligence. This ruling is another example of impartiality on the part of the court [R. T. 1221-1222].

The defense later produced Myrna Neil who testified that Kathy O'Brien had lived with a girl named Joan at the Poinsettia Apartment and that there had not been room for anyone else [R. T. 1235, 1246].

When defense counsel next raised the question of the apartment manager, he stated that he had sent a person to the apartment to serve the subpoena, but that the manager had not been located. The court then again denied a continuance [R. T. 1255-1257]. In view of the fact that the offered testimony would be basically cumulative in the light of Neil's testimony mentioned above, this ruling was well within the discretion of the court. Ten pages further on in the transcript the court again inquired of

defense counsel whether he had any further witnesses. When defense counsel made no further mention of the apartment manager and merely stated "Nothing further, your Honor", the court declared both sides to have rested [R. T. 1267].

This proper action by the court in expediting a lengthy trial constitutes a reasonable action by the court and cannot be considered part of a plan by a biased judge to deprive a defendant of his rights. The record reveals that the court allowed the defense full opportunity to put on its case.

5. Appellant claims that the trial court's rulings on the scope of cross examination proves that the court was biased in favor of the prosecution. He presents examples which are claimed to prove that defense counsel was unduly restricted in cross examination of Hoskins while government counsel enjoyed the full scope of cross examination of both defendants on similar subjects.

Defense counsel's cross examination of Mrs. Hoskins on her present employment and her income tax was limited by the court because it was irrelevant and beyond the scope of cross examination [R. T. 471, 477-478].

In contrast, government counsel's questions on cross examination of Kornhaber concerning his present employment were based on Kornhaber's testimony on direct concerning his employment background [R. T. 647, 613-614]. The answers helped clarify confusion left by the defense counsel's examination as to Kornhaber's employment at the time of the trial.

Questions asked of appellant on cross examination about his

income tax arose directly from Courtney's statements about his earnings and were used by government counsel to impeach Courtney's testimony [R. T. 1016-1017].

The problems raised in cross-examination of Hoskins, Kornhaber and Courtney were distinct and required different, distinct and appropriate rulings. The trial court has liberal discretion in determining latitude to be given on cross examination of witnesses. Bass v. United States, 326 F. 2d 884, 890 (8th Cir. 1964); Twachtman v. Connelly, 106 F. 2d 501 (6th Cir. 1939).

6. The claimed bias in the court's giving of contemporaneous limiting instructions is completely unfounded. There are many instances of prompt instructions by the court to limit government counsel's questions, especially in the cross examination of Courtney in regard to his income tax returns [R. T. 969, 1017]. The court showed a conscientious effort to protect the appellant throughout the trial.

7. Within a series of legal presumptions, the court stated: "The law presumes that official duty, including the duties and functions of police officers and of F. B. I. agents and other law enforcement officers . . . that official duty has been regularly performed." [R. T. 1439]. This was not unusual or confusing, especially in the middle of instructions on other legal presumptions. This could not have created a prejudice in the jury in favor of the F. B. I. or police, especially after the lengthy instructions given to the jury on the consideration of testimony [R. T. 1435-1437]. It is the responsibility of the trial court to determine the language of the

instructions to the jury. Cohen v. Evening Star Newspaper Co., 113 F. 2d 523 (D. C. Cir. 1940). The court carried out this responsibility with ulmost care and without any prejudice.

8. While the appellant claims that the court showed unexplained hostility towards trial defense counsel, the record only shows that the court expressed displeasure in that on one occasion counsel was late to court [R. T. A-13], and on a second occasion failed to appear because of an appearance in state court [R. T. 1517-1518]. On neither occasion did the court use any abusive language. On the second occasion, the court granted the continuance requested by the defense [R. T. 1525]. Since a federal judge has the duty of and right to maintain control of his court room and since in no possible way could the defendant have been prejudiced by these actions of the court, the claimed error is without merit. In Re Osborne, 344 F. 2d 611 (9th Cir. 1965).

9. The brief of appellant's counsel makes many unfounded assertions as to the incorrectness of the court's order denying appellant's in forma pauperis motion. But the order does not contain misstatements, but logical interpretations of the testimony and findings of the jury.

a. The order states, "Defendant's own doctor testified at the hearing on the motion for continuance that he was entirely competent physically and mentally to stand trial and did in his own defense." (Appellant's Brief, Appendix B).

Dr. Hutler, who was an associate of Dr.

Gentile, who examined Courtney, could be referred to as Courtney's doctor [R. T. A-59-63]. Dr. Hutler stated that he was aware of nothing that would lead him to believe that Mr. Courtney could not stand trial [R. T. A-66].

b. The order states, "A physician for the Government . . . found that he (Courtney) was not under the influence of any drugs" (Appellant's Brief, Appendix B).

Dr. Cohen stated that the drugs did not adversely affect Courtney mentally [R. T. 23]. There is only a difference in phraseology, not meaning between this and the statement in the order.

c. The order states that Dr. Cohen found the defendant "totally competent" (Appellant's Brief, Appendix B).

Dr. Cohen answered in the affirmative to the court's question, "Is it then, in summary, your opinion that you feel that this defendant is sufficiently oriented, sufficiently unimpaired in mental ability, both to understand the nature of the proceedings, and to cooperate with his counsel in his own defense?" [R. T. 26-27]. From this statement, it is a perfectly logical conclusion that Courtney was "totally competent to stand trial".

d. The order states that there was "no

contention at any time during the actual trial that the defendant was under the influence of any drugs" (Appellant's Brief, Appendix B).

No actual contention that Courtney was under drugs was made during the trial. Mr. Stanley raised the question that Courtney's speech was effected by drugs but the court could not find any lack of clarity in appellant's speech [R. T. 793]. During the trial no actual contention was made that appellant was under the influence of drugs.

e. The order states, "Testimony . . . revealed that the defendant had derived substantial money from at least three prostitutes . . ." (Appellant's Brief, Appendix B).

Appellant received money from three prostitutes, Loretta Hoskins, Beverly Caputo and Kathy O'Brien [R. T. 349-351, 1122].

The contents of the order denying the motion do not, therefore, show bias or prejudice on the part of the trial judge. Though appellant may interpret the evidence differently, the court's statements are logical conclusions based on the testimony throughout the entire trial.

During the trial, Judge Hill showed no bias or prejudice. The trial court must be free from unfounded, unreasonable attack so that all parties may receive justice.

"It is one of the glories of federal criminal

law administration that a district judge is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted."

United States v. Curcio, 279 F. 2d 681 at 682 (2nd Cir. 1960).

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert L. Brosio

ROBERT L. BROSIO